

AMENDMENT TO MEMORANDUM OF AGREEMENT BY AND BETWEEN UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND MONTGOMERY COUNTY, NEW YORK, REGARDING BEECHNUT NUTRITION CORP. SUPERFUND SITE

WHEREAS, in December, 2015, the United States Environmental Protection Agency (“EPA”) commenced certain cleanup response actions pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9601-9675, at the Beechnut Nutrition Corp. Superfund Site, a facility including approximately 26.9 acres of real property and the buildings thereon at 68-102 Church Street, Village of Canajoharie, Montgomery County, New York (“Site”);

WHEREAS, on July 21, 2017, EPA and Montgomery County entered into a Memorandum of Agreement (hereinafter “2017 MOA”) regarding, among other things, the release of EPA’s existing and potential CERCLA liens pursuant to CERCLA Sections 107(l) and 107(r), 42 U.S.C §§ 9607(l) and 9607(r), against the real property on which the Site is located and that is identified as tax parcel number 63.14-1-9.1 in the Village of Canajoharie, Montgomery County, New York (“Property”);

WHEREAS, Montgomery County intends to subdivide the Property in order to facilitate the redevelopment of the Property;

NOW THEREFORE, EPA and Montgomery County agree that the 2017 MOA requires amendment and that the agreement memorialized in this amendment (hereinafter, “Amendment”) is necessary. The 2017 MOA is hereby amended as follows:

1. Each and every reference to “Memorandum of Agreement” or “Agreement” is defined to include this Amendment.
2. In the second WHEREAS clause, the defined term “Property” is amended to include “and/or any subdivision thereof.”
3. The second, third, and fourth WHEREAS clauses referencing Montgomery County’s Tax Lien, EPA’s CERCLA Liens, and EPA’s right of redemption pursuant to 28 U.S.C. § 2410(c) are amended to be read in the past tense.
4. The following WHEREAS clauses are added:

WHEREAS, on August 4, 2017, EPA executed the Discharge and Release of Federal Lien releasing EPA’s CERCLA Liens, which was recorded in the Montgomery County Clerk’s Office by Montgomery County on August 25, 2017, Pursuant to Paragraph 1 of the 2017 MOA;

WHEREAS, on September 20, 2017, Montgomery County foreclosed on its Tax Lien and took ownership of the Property;

WHEREAS, on November 15, 2017, EPA and Montgomery County entered into Administrative Settlement Agreement and Order on Consent for a Removal Action, Index No. CERCLA-02-2018-2001 (“AOC”), whereby Montgomery County voluntarily agreed to conduct certain response activities at the Site;

WHEREAS, EPA supports the redevelopment of former Superfund sites and is willing to enter into this Amendment to allow for the subdivision of the Property;

5. Paragraph 3.a. is modified to insert the following at the end of the paragraph: Montgomery County may subdivide the Property and transfer all or any portion of the Property to one or more private entities in furtherance of the Property’s redevelopment, and such transfers shall be subject to the terms and conditions of this Agreement.

6. Paragraph 4.a. is deleted and replaced with the following:

4.a. The distribution and payment to EPA and Montgomery County of the proceeds from each and every sale of the Property shall be as follows:

i. Immediately upon the closing of title, Montgomery County shall be entitled to reimbursement of up to the documented monies obtained by Montgomery County in the form of grant monies that were available for other purposes, but which Montgomery County chose to use to directly perform removal activities required pursuant to Paragraphs 54, 55.c, and 55.e-h. of the AOC, which documentation shall be subject to EPA approval and consist of: all grant documents and proof of expenditure to perform removal activities required pursuant to the AOC;

ii. If there are proceeds from sale remaining after Montgomery County is reimbursed pursuant to subparagraph 4.a.i. above (hereinafter, “Remaining Proceeds”), then immediately upon the closing of title, Montgomery County shall be entitled to 50% of the Remaining Proceeds;

iii. Immediately upon the closing of title, the other 50% of Remaining Proceeds shall be escrowed in the Montgomery County Trust Account titled: T62—Assurance Fund (hereinafter “Trust Account”) for the benefit of EPA and Montgomery County. The Remaining Proceeds shall be permitted to remain in the Trust Account for up to five years from the date of EPA execution of this Amendment. The date of the expiration of the five-year period is hereinafter defined as the “Five-Year Date.” Disbursements from the Trust Account may only occur pursuant to the following procedure:

- A) Within Ninety (90) days of the earlier of the date that EPA and Montgomery County agree that disbursement should be made from the Trust Account or the Five-Year Date, Montgomery County shall submit the following documentation:
  - 1. Montgomery County employee time spent directly on removal activities performed pursuant to the AOC and attested to by the employee in a signed declaration pursuant to 28 U.S.C. § 1746;
  - 2. Invoices and evidence of payment for all contractors and/or environmental services utilized to perform removal activities required pursuant to the AOC;

This documentation shall be the basis for determining the amount of monies expended by Montgomery County from Montgomery County appropriations to perform removal activities required pursuant to Paragraphs 54, 55.c., and 55.e-h. of the AOC (hereinafter referred to as “County Funds”), which amount shall be

subject to EPA approval prior to disbursement; and

B) Within thirty (30) days of EPA approval of amount of County Funds as determined pursuant to Paragraph 4(a)(iii)(A) Montgomery County shall pay to EPA the Remaining Proceeds in the Trust Account less the County Funds.

7. Paragraph 4.b is deleted and replaced with the following:

The amount paid to EPA by Montgomery County pursuant to Paragraph 4.a. shall not exceed EPA’s response costs, including interest, incurred or to be incurred in performing removal activities at the Site less \$17,657 of EPA’s response costs incurred addressing contamination during the County’s redevelopment of the Site, but not attributable to the work performed under the AOC.

8. Paragraph 5 is deleted and replaced with the following:

Notification to EPA of Status: Until such time as full payment has been made to EPA as provided by Paragraph 4 of this Agreement, Montgomery County shall advise EPA in writing at the address or email address provided in Paragraph 3.d., not less often than every six (6) months following the date of EPA execution hereof for the first year and annually every year thereafter until the date that full payment has been made pursuant to Paragraph 4, as to the status of other significant related events including the solicitation of requests for proposals and responses thereto; the status of the Trust Account; and the sale or transfer of the all or any part of the Property from Montgomery County or another governmental entity to a developer or end user.

IN WITNESS WHEREOF, this Agreement has been signed by duly authorized representatives of the Parties.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By \_\_\_\_\_  
Pat Evangelista, Director  
Superfund and Emergency Management Division, Region 2

Date: \_\_\_\_\_

COUNTY OF MONTGOMERY

By \_\_\_\_\_  
County Executive

Date: \_\_\_\_\_

